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No.:_____

IN THE

Supreme Court of the United States

October Term, 1981

NICHOLAS A. ATTICK,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. Whether a person can be held to be a shareholder under Rhode Island law, for purposes of a criminal false statement statute, where he is beyond the definition of the only Rhode Island statute defining a shareholder.

2. Whether a person can be convicted of making a false statement where he claimed he was not a shareholder; that claim may be true; and the Court of Appeals affirmed on the basis of a legal theory never relied upon by the government or the trial court, under which theory apellant's claim may be construed as false.

3. Whether a conviction for making a false statement can stand, where the effect of the trial court's instructions was to decide for the jury the question of whether the defendant believed the statement to be false.

4. Whether a sentence based upon erroneous and mischaracterized information should be vacated and remanded for resentencing.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Nicholas A. Attick respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on May 22, 1981 and from the order of that Court denying the petition for rehearing and the motion for permission to file an amendment to the petition for rehearing.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears as Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on May 22, 1981; and the order, denying both the petition for rehearing and the motion for permission to file an amendment to the petition for rehearing, on June 17. This petition was filed within 60 days of both of these dates. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Notice of Appeal appears as Appendix E hereto.

Constitutional and Statutory Provisions Involved

This case involves the Sixth Amendment to the United States Constitution, one of the federal criminal false statement statutes, 18 U.S.C. § 1014, and the definition of a shareholder under the law of Rhode Island, General Laws of Rhode Island § 7-1.1-2(f), each of which is set out, verbatim, in Appendix D hereto.

Statement of the Case

This case arises out of a revolving credit loan entered into on March 23, 1979, between J. Daren & Sons, Inc., and the First Bank of Connecticut.[1] The loan agreement contained a provision that the borrower, J. Daren, was not permitted to " ... make any distribution of cash ... to holders of shares of its capital stock ..."[2] If such a distribution occurred it would constitute an "Event of Default." To obtain an advance from the bank, a "Request for Advance" would be filled out; it contained a recital that no "Event of Default" has occurred.[3]

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[1]Appendix filed with the Court of Appeals (hereinafter "App.") 4-12.

[2]App. 23.

[3]App. 13.

On the same date the loan agreement was made, March 23, 1979, it was assigned to the Rhode Island Hospital Trust National Bank of Providence, Rhode Island.[4] The Hospital Trust's deposits were insured by the Federal Deposit Insurance Corporation.

The loan agreement also provided that "[t]his agreement and the note shall be construed in accordance with and governed by the laws of the State of Rhode Island."[5]

On April 10, May 16 and 24, June 12 and 21, and July 9, 1979, requests for advances were made. Prior to these dates, J. Daren & Sons, Inc., had distributed cash to the defendant, Nicholas A. Attick.

A grand jury sitting in Rhode Island returned an indictment which charged that since " ... Nicholas A. Attick was ... principle shareholder of J. Daren & Sons, Inc.,"[6] each of the requests for advances contained a false statement. Nicholas A. Attick was charged with having violated Title 18 U.S.C. § 1014 and § 2(b).[7]

At the trial, the evidence showed that "[t]he stock of the J. Daren Corporation is owned by the Olympac Corporation,"[8] and that Nicholas Attick owned "the stock of Olympac Corporation."[9] Moreover, prior to

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[4]App. 18.

[5]App. 17.

[6]App. 4.

[7]18 U.S.C. § 1014 provides in relevant part that "[w]hoever knowingly makes any false statement ... for the purpose of influencing in any way the action of ... any bank the deposits of which are insured by the Federal Deposit Insurance Corporation ... upon any application, advance ... shall be fined not more than $5,000.00 or imprisoned not more than two years, or both.

18 U.S.C. § 2(b) states that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

[8]App. 23.

[9]App. 23.

entering into the loan agreement, the bank was on notice that this was the relationship between Mr. Attick, Olympac and Daren,[10] and the bank was quite familiar with treating individuals and corporations as "separate and distinct."[11]

In regard to the evidence at trial that became important in light of the reasoning of the First Circuit, a vice-president of the bank, Peter Paquin, testified that he had become aware that Nicholas Attick "was president and sole stockholder of" Daren.[12] On cross-examination, Mr. Paquin began by stating that appellant had told the bank officials that "he was [Daren's] sole stockholder."[13] However, defense counsel went on to ask Paquin whether a document, presented to the bank by Nicholas Attick prior to the loan agreements being signed, stated "that the stock in J. Daren Company was owned by a holding company," i.e., Olympac, and Paquin acknowledged that was correct.[14] Then Paquin is asked whether he was on notice that Attick "did not personally own the stock."[15] When he hedges, he is then asked whether the bank distinguishes, when they make a loan, between a corporation and an individual, and he finally acknowledges that they "are separate and distinct."[16]

One final passage is important in terms of the jury instruction which is at the heart of this petition. Appellant took the stand, and, among other matters, testified to the relationship between himself, Olympac and Daren, and to what he believed to be the legal significance of that relationship:

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[10]App. 19.

[11]App. 20.

[12]Transcript of trial (hereinafter "Tr.") 7.

[13]Tr. 81; the Appendix to this Petition (hereinafter "A-") 4.

[14]Tr. 81.

[15]Tr. 81.

[16]Tr. 81-82.

"Q. Mr. Attick, do you own any stock in the J. Daren Corporation, sir?

A. No, I do not own any stock in J. Daren Corporation.

Q. Have you ever owned any stock in the J. Daren Corporation?

A. No, I have never owned any stock in J. Daren Corporation.

Q. Do you know of your own knowledge who owns the stock in the J. Daren Corporation?

A. The stock of the J. Daren Corporation is owned by the Olympac Corporation of New York.

Q. Mr. Attick, who owns the stock in the Olympac Corporation?

A. I own the stock of Olympac Corporation."[17]

The Rhode Island Business Corporation Act defines a shareholder as "one who is a holder *of record* of shares in a corporation." Gen. Laws of Rhode Island § 7-1.1-2(f)[18] [emphasis added].

At the conclusion of the case, two legal arguments were put forth simultaneously by the government and the defense; the government requested that the judge instruct the jury that if they found Nicholas Attick was the sole stockholder in Olympac (which he had stated when he took the stand), then he was therefore "a shareholder of J. Daren and Sons";[19] at the same time, the defense moved for acquittal because the government had failed to prove that Attick was a shareholder of Daren.[20] The only authority which the government presented to the Court was

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[17]Tr. 631-632.

[18]Nor is the Rhode Island statute requiring ownership of record an anomaly. The language is taken directly from the ABA-ALI Model Business Corporation Act § 2(f).

[19]App. 24.

[20]App. 26.

Sell v. United States, 336 F.2d 467 (10th Cir. 1964), a case which did not purport to define a shareholder under Rhode Island law, but only held that where a person denies owning grain, and conceals that he does in a corporate name, there is enough to confirm a false statement conviction. Sell, unlike Attick, did not fully reveal prior to the critical events his ownership in the corporate form.

The District Court accepted that, under the law, Olympac and not Attick held the Daren stock, for the judge held "that Mr. Attick does not own stock in J. Daren in his name, the legal titleholder of that stock is Olympac."[21] Nonetheless, the Judge decided to give the instruction requested by the government, on the basis that to refuse "would seem to elevate form over substance."[22] Here are the instructions on the issue of Attick being a shareholder, and of his belief as to his shareholder status:

> "The offenses charged in each Count of the indictment have four essential elements:
>
> * * *
>
> *SECOND*: That defendant made false statements to the bank;
>
> *THIRD*: That defendant knew the statements were false; ....
>
> * * *
>
> The government is obliged to establish each of these elements as to each Count in the indictment by proof beyond a reasonable doubt.
>
> An act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

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[21] App. 28.

[22] App. 28.

The purpose of adding the word 'knowingly' is to insure that no one will be convicted for an act done because of mistake, or accident, or other innocent reasons.

A statement is 'false' if untrue when made, and then known to be untrue by the person making it or causing it to be made.

The Government has charged in its indictment that the defendant, Nicholas Attick, was a shareholder of J. Daren & Sons, Inc., and as such violated a loan agreement entered into on March 23, 1979. Whether the defendant is an owner of stock of J. Daren & Sons, Inc., is an essential element of the offense charged under the circumstances of this case. *If you find beyond a reasonable doubt that the stock of J. Daren was owned by the Olympac Corporation and that the defendant was the sole stockholder of the Olympac Corporation, you may find that the defendant was the beneficial owner of the stock of J. Daren Company.*

Unless you find beyond a reasonable doubt that defendant was an owner of stock of J. Daren Corporation, you must find the defendant not guilty on each count.

You must not conclude or assume from the mere fact that the defendant is President of J. Daren & Sons, Inc., that he is a shareholder in said corporation. The two are separate and distinct. The Government has the burden, beyond a reasonable doubt, to prove to you that the defendant is a shareholder in the J. Daren & Sons, Inc. Company."[23]

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[23]Tr. 675-6.

A juror, hearing this instruction, would understand that the only issue to decide in regard to shareholding was the chain of ownership, and that the chain had to be established beyond a reasonable doubt. Since appellant himself had testified to that chain, the judge's instruction commanded the jurors to find that this "essential element of the offense charged under the circumstances of this case" had been admitted. More importantly, the instruction told the jurors that, in regard to the stockholder element of the indictment, Nicholas Attick could only be acquitted if they decided that there was not such a chain of ownership, the critical issue of what Attick believed his shareholder status to be was taken away from the jury.

The underlined portion of the instructions was repeatedly objected to by defense counsel.[24] A copy of the entire charge was sent to the jury room.[25]

Appellant was convicted on five counts of submitting false statements in violation of 18 U.S.C. §§ 1014 and 2(b). He was given a maximum sentence on each count totalling four years imprisonment, plus a committed fine of $25,000.00. (Two years imprisonment on each of the first two counts to be served consecutively and, on the balance, concurrent two years suspended sentences with two years probation to begin upon release.)

After the conviction, but prior to sentencing, defendant moved for a judgment of acquittal or, in the alternative, for a new trial.[26] It was argued by appellant that (1) under Rhode Island corporation law he was not a shareholder, i.e., record holder of shares of Daren, and (2) even if he were, the government had not proved that the representations to the bank were not intended to be literally true. [27] These same arguments were then presented to the Court of Appeals.

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[24]App. 30-32.

[25]App. 35.

[26]App. 3.

[27]App. 36-42.

The First Circuit rejected applying the statutory definition found in the Rhode Island Business Corporation Act "because we believe that Rhode Island contract law, not corporation law, governs the means of the words in the agreement."[28] The Court held that it was for the jury to determine what the parties meant by shareholder, and that Paquin's testimony showed that the parties, particularly the bank, had reason to believe that Attick was a shareholder of Daren.[29]

The Court held, in the alternative, that even if corporation law did apply, the corporate identity can be disregarded in Rhode Island " 'if it is used to defend public convenience, justify wrong, protect fraud, or defend crime or work an injustice'."[30] Again, the question of what Attick believed his status to be would turn on the jury's consideration of events leading up to the signing of the Loan Agreement.

Appellant filed a timely petition for rehearing, arguing that the objected-to instruction on beneficial ownership "remove[d] from the jury's consideration an essential element of the offense," i.e., whether Attick believed that he, not Olympac, was a shareholder of Daren.[31] In support of this position, appellant cited to *United States v. Singleton*, 532 F.2d 199, 207 (2nd Cir. 1976); *United States v. Moore*, 571 F.2d 76, 89 (2nd Cir. 1978) and this Court's opinion in *Henderson v. Kibbe*, 431 U.S. 145, 153 (1977).

Additionally, appellant moved to amend the petition to argue that the appellant's sentence was based upon erroneous assumptions and misinformation.[32]

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[28]A-5.

[29]A-3 to A-4.

[30]A-5.

[31]Petition for Rehearing, before Court of Appeals, Appendix B attached hereto (hereinafter "B-"), p. 5.

[32]Motion to Amend, before Court of Appeals, Appendix C attached hereto.

The Court of Appeals issued an order denying the petition for rehearing and the motion to amend; no opinion was filed, nor were any reasons provided for the denial in the order.

Reasons for Granting the Writ

I.

The Reasoning of the Court of Appeals Holds a Statement to Be False Which Is Literally True Under the Only Rhode Island Statute Defining a Shareholder: This Violates This Court's Holding in *Palmer v. City of Euclid.*

The only statute in Rhode Island which defines who is a shareholder under the law of that state requires that it be a *record* holder of shares. Gen. Laws of Rhode Island § 7-1.1-2(f). Nicholas Attick testified that he did not believe himself to be a shareholder of Daren because Daren stock was owned by Olympac.[33] A layman, even an attorney, reading the Rhode Island statute in conjunction with the Loan Agreement could believe Nicholas Attick was not prohibited from receiving cash disbursements from J. Daren. A statute is "unconditionally vague as applied to a particular person's conduct if it fails 'to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden ....' " *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971) quoting from *United States v. Harris*, 347 U.S. 612, 617 (1954).[34]

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[33]Tr. 631-632.

[34]Brief for appellant before Court of Appeals, p. 8.

II.

The Reasoning of the Court of Appeals Raises Questions of Importance in the Administration of All of the Criminal False Statement and Perjury Statutes As Defined by *Bronston v. United States*

This conviction was pursuant to 18 U.S.C. § 1014, but the underlying analysis affects a thread running throughout all of the false statement and perjury statutes. The Court of Appeals reasoning strips away the defense that if the statement has a reasonable construction under which it is true, then even if there are more reasonable constructions under which it is false, he can not be convicted of making a false statement or of having committed perjury. This Court unanimously held in *Bronston v. United States*, 409 U.S. 352, 352-3 (1973) that a person cannot "be convicted of perjury for an answer under oath that is literally true but not responsive to the question asked and arguably misleading by negative implication." This analysis has been applied to false statement cases by the Court of Appeals:

> "We note that the reluctance in *Diogo* [320 F.2d 898 (2nd. Cir., 1963)] to find a knowing false statement where the challenged assertion *may* be literally true, even if false by implication or omission, is consistent with the Supreme Court's recent construction of the federal perjury statute, 18 U.S.C. § 1621, in *Bronston v. United States*, 409 U.S. 352, 360, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973) and cases cited therein." *United States v. Lozano*, 511 F.2d 1, 5 (7th Cir.), *cert. denied*, 423 U.S. 850 (1975) [emphasis added].

This construction of false statement and perjury statutes has been, prior to this decision, consistently employed by the Courts of Appeals. See, e.g., *United States v. Vesaas*, 586 F.2d 101, 104 (8th Cir. 1978); *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1963). Under the mode of analysis employed by the

Court of Appeals in the present case, a conviction will be upheld so long as the challenged assertion "*may* be literally" false, thus turning the standard set forth by this Court, and followed throughout the Circuits, on its head.

III.

The Holding in the Court of Appeals Denied Petitioner His Constitutional Right to Have the Jury Determine His Intent.

The test for error in jury instruction "requires a comparison of the instructions which were actually given with those that should have been given." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). Here is the one that should have been provided:

> " 'The Government has charged in its indictment that the defendant, Nicholas Attick, was a shareholder of J. Daren & Sons, Inc., and as such violated a loan agreement entered into on March 23, 1979. Whether the defendant believed himself to be a holder of stock of J. Daren & Sons is an essential element of the offense charged under the circumstances of this case.
>
> "In deciding whether the defendant so believed you need not take his word alone on whether he believed himself to be a shareholder of J. Daren; you may consider 'the words of the contract and the circumstances surrounding the choice of those words, including representations made in the course of negotiations.[35] But in considering such evidence, you are not being asked to decide whether the bank believed Nicholas Attick was a holder of Daren shares; you are not asked to decide whether the bank might

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[35] A-3.

reasonably have believed Nicholas Attick to be a holder of Daren shares.[36] The question you are to decide is whether Nicholas Attick believed himself to be a holder of J. Daren shares, [37] and you must decide that he did so believe beyond a reasonable doubt, in order to convict.' "[38]

The instruction that was given began correctly; the first sentence in the proposed charge is identical to the first sentence in the actual charge. The second sentence in the proposed charge is similar. There are two important differences: (1) where the proposed charge stays with the language of the contract and indictment, i.e., holder of shares, the actual charge introduced the concept of ownership of stock; (2) more importantly, the proposed charge focused upon Attick's belief in whether he held Daren stock, and the actual charge focuses upon "[w]hether the defendant is an owner of stock of J. Daren." Since the jury could determine that the bank not only believed Attick to be a Daren shareholder, but that such an "interpretation ... *might reasonably have* [*been*] *made*," *Diogo, supra* at 906, they were misdirected as to how to consider the evidence.

However, all of this pales compared to the next sentence. Instead of commanding the jury to consider what Attick believed as revealed in his statements in the critical period leading up to the signing of the contract, the jury is instead told that if they found that J. Daren stock was owned by Olympac, and defendant was the sole stockholder of Olympac, "you may find that the defendant was the beneficial owner of the stock of J. Daren Company." This told the jury to ignore any evidence regarding conversations prior to the loan agreement being signed; ignore Attick's

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[36] *United States v. Diogo*, 320 F.2d 898, 905-6 (2nd Cir., 1963).

[37] *Diogo, supra*, at 905-6.

[38] Petition for Rehearing Before the Court of Appeals, B-6 to B-7.

repeated statements that he owned Daren through a holding company, and what that statement may have meant to Attick. In fact, the jury is directed to ignore all of the evidence that the Court of Appeals relied upon to sustain the correctness of the instruction under Rhode Island law. The objected-to instruction orders the jury to only consider two pieces of evidence, both conceded by the defendant on the stand. Contrary to *Henderson v. Kibbe*, 431 U.S. 145 (1977), the record in the present case requires a conclusion that the jury never considered whether Attick believed himself to be a J. Daren shareholder; that the jury never considered the record testimony cited to by the Court of Appeals; and that the instruction told the jury that since the two matters they were to review under the reasonable doubt standard were both testified to by the defendant, the jury was, in effect, directed to find Nicholas Attick a holder of J. Daren shares and thus guilty.

The analysis of "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979). Here a reasonable juror could have and would have interpreted the instructions on the issue of holding Daren stock to be contained in one clear directive: if the Daren stock was held by Olympac, and Olympac stock was solely held by Attick, then the question of the Daren stock, including Attick's belief about it, must be resolved against Attick.

The instruction given here as to beneficial ownership comes squarely within the following analysis of this Court:

> " '*It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act ... A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.*

> A presumption which would permit but not require the jury to presume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition." *Sandstrom, supra*, 442. U.S. at 522, quoting from *Morissette v. United States*, 342 U.S. 246, at 274-275 [emphasis in original].

This Court has repeatedly exercised its direction in favor of granting certiorari in civil cases to protect "the jury function in passing on disputed questions of fact and *in drawing inferences from proven facts.*" *Wilkerson v. McCarthy*, 336 U.S. 53, 70-71 (1949) (Douglas, J., concurring) [emphasis added]. See also e.g., *Beacon Theatres v. Westover*, 359 U.S. 500, 501 (1959); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1934). Certiorari should be granted even more readily when the jury function at stake is granted under the Sixth Amendment to the Constitution.

IV.

The Court of Appeals Failed to Address Petitioner's Contention That His Sentence Was Based Upon Erroneous Information and Should Have Been Vacated in Light of Recent Second Circuit Decisions.

Recent decisions in the United States Court of Appeals for the Second Circuit have permitted that Court to review and vacate criminal sentences when they may have been based upon erroneous assumptions or misinformation. *U.S. v. Malcom*, 432 F.2d 809 (2nd Cir. 1970); *U.S. v. Stein*, 544 F.2d 96 (2nd Cir. 1976); and *U.S. v. Robin*, 545 F.2d 775 (2nd Cir. 1976). The First Circuit has not followed this trend and refused to permit Petitioner to present this argument as an amendment to his Petition for Rehearing.

Though the Court of Appeals found that the conviction was based upon the interpretation of a contract provision, the District Court characterizes Petitioner's

activities as analogous to robbing a bank with a sawed-off shotgun.[39] Such a crime is far removed from the "white collar crime" of which Petitioner was convicted. This misapprehension becomes even more apparent in light of the *Bronston* decision which frowned upon prosecution when the defendant has told the literal truth. *Supra*, at 409 U.S. 362.

In view of the nature of Petitioner's crime his punishment of concurrent sentences is especially harsh. Though he was convicted on five counts his acts were so similar in nature so as to be treated as one. His crime, that of misunderstanding what appeared to be a clear contract term, only occurred once, his actions from that time on were based upon that one wrong and not a series of separate and distinct criminal actions. Thus, the holding in *U.S. v. Robin*, 545 F.2d 775, 782 (2nd Cir. 1976) becomes relevant. Therein the Court noted the severity of Robin's sentence and stated "... we are especially concerned when a harsh sentence is imposed upon so questionable a foundation as existed in this case."

In light of the severity of Petitioner's sentence and the Court's mischaracterization of his crime, the Court of Appeals should have permitted review of this issue.

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[39]Transcript of sentencing proceeding, October 29, 1980, Page 10.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgments and opinion of the First Circuit.

Dated: New York, N.Y.
June 26, 1981.

Respectfully submitted,

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Certificate of Service

New York, New York

June , 1981

I, , hereby certify that I have this day served three copies of the PETITION FOR A WRIT OF CERTIORARI by mailing same, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and mailing three copies to Assistant United States Attorney James E. O'Neill, Office of the United States Attorney, P.O. Box 1401, Providence, Rhode Island 02901.

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1726

UNITED STATES OF AMERICA,
Appellee,

v.

NICHOLAS A. ATTICK,
Defendant-Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[Hon. Francis J. Boyle, *U.S. District Judge*]

Before *Coffin, Chief Judge,*
Campbell and Breyer, *Circuit Judges.*

Marshall D. Stein, with whom *Hale, Sanderson, Byrnes & Morton* was on brief, for appellant.
James E. O'Neil, Assistant United States Attorney, with whom *Paul F. Murray*, United States Attorney, and *Calvin B. Kurimai*, Special Attorney, United States Department of Justice, were on brief, for appellee.

May 22, 1981

Breyer, *Circuit Judge.* Appellant Nicholas A. Attick was convicted of submitting false statements to the Rhode Island Hospital Trust National Bank, a

federally insured bank, for the purpose of influencing the bank to loan his company money in violation of Title 18, U.S. Code, §§ 1014 and 2(b).[1] Attick was sentenced to a total of four years imprisonment and fined a total of $25,000.

Attick was president and owner, through a holding company, of J. Daren and Sons Incorporated, a food service company. On March 23, 1979, J. Daren entered into a Revolving Credit Loan Agreement (the "agreement") with a bank in Connecticut. It was assigned to the Hospital Trust Bank. The agreement provided that the borrower, J. Daren, would request funds, up to $2.5 million, from the Hospital Trust Bank, by means of a form called a "Request for Advance".

An officer of J. Daren was required to sign a Request for Advance form prior to each advance of credit. It states that J. Daren "represents and warrants that no event has occurred and is continuing, or would result from the proposed Advance, which constitutes an 'Event of Default', as that term is defined in the Agreement ...."

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[1]Title 18, U.S.C., § 1014 states in part: "Whoever knowingly makes any false statement or report ... for the purpose of influencing in any way the acts of ... any bank the deposits of which are insured by the Federal Deposit Insurance Corporation ... upon any application, advance ... or loan, ... shall be fined not more than $5,000 or imprisoned for not more than 2 years or both."

Title 18, U.S.C. § 2(b) states: "Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

J. Daren agreed in the standard language contained in the agreement, that it would not directly or indirectly distribute cash "to holders of shares of its capital stock" unless the Hospital Trust Bank consented in writing. Violation of that covenant constituted an "Event of Default".

On April 10, May 16, May 24, June 12, June 21 and July 9, 1979, Requests for Advances of more than $750,000 were made to the Hospital Trust Bank on forms setting forth the above representation and warranty, as provided in the agreement. It is undisputed on this appeal that during the same period Attick caused approximately $350,000 of J. Daren cash to be distributed for his own personal use. At the time of sentencing, J. Daren was in Chapter XI proceedings.

The government charged that defendant obtained money from the bank in part by making a false statement, namely, the statement made at the time he requested advances from the bank that "no event has occurred ... which constitutes an 'Event of Default' as that term is defined in the Agreement ...." This statement, in the government's view, was false because Attick knew that an Event of Default had occurred, namely the event consisting of J. Daren's distribution to Attick of cash from the corporation.

Appellant was convicted. His claim on this appeal is one of "truth". He correctly points out that one cannot be convicted under 18 U.S.C. § 1014 if the statement claimed to be false is, in fact, literally true. *See United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963) (construing similar language in 18 U.S.C. § 1001). He adds that his statement to the bank was literally true because no Event of Default had occurred. In his view, J. Daren's payment of the loan's proceeds to him did not violate the agreement because the agreement's prohibition of distributions of cash "to holders of shares" of J.

Daren was not violated. Appellant argues that he was not a "holder of shares" of J. Daren because, in fact, all J. Daren shares were owned by Olympac Company — a holding company of which appellant is admittedly the sole shareholder. In his view, the fact that he owns J. Daren shares through Olympac means that the agreement, technically speaking, was not breached, and therefore he did not lie when he told the bank the agreement had not been breached.

We believe, however, that there was evidence in the record from which the jury could conclude beyond reasonable doubt that the agreement was breached and that the defendant knew it. The agreement specifies that it is to be interpreted in accordance with Rhode Island law. Under Rhode Island law governing the interpretation of contracts, as under the common law, the meaning of the terms in an agreement depends upon the understanding of the parties, determined from the words of the contract and the circumstances surrounding the choice of those words, including representations made in the course of the negotiations. *See Hill v. M.A. Alper & Son, Inc.*, 106 R.I. 38, 47, 256 A.2d 10, 15 (1969). *See also Westinghouse Broadcasting v. Dial Media*, 410 A.2d 986, 992 (R.I. 1980). Peter Paquin, Vice President of Hospital Trust Bank, testified that, during the negotiations for the loan, Attick outlined the nature of J. Daren's business and told Paquin that he was its "president and sole stockholder". He testified:

> (Direct Examination)
> Q. And did you become aware of his position with the food brokerage business, sir?
> A. Yes, he was president and sole stockholder of the J. Daren and Son." (Transcript at 7)
> (Cross Examination)
> Q. When did you learn, Mr. Paquin, that Mr. Attick is the sole stockholder of J. Daren and Company?

> A. We became fully aware of that — we were told that initially going into the thing that he was the sole stockholder.
> Q. Did you check that out?
> A. No, we took his word for it. (Transcript at 80-81)

Moreover, in a report, which Attick submitted to the Hospital Trust Bank when applying for the revolving credit arrangement, he described his relation to J. Daren as follows:

> Mr. N.A. Attick acquired by purchase, through a wholly-owned holding company, all of the common stock of J. Daren and Sons Company ....

Further, it is clear that the purpose of the agreement provision at issue was to prevent those who controlled J. Daren from milking it of cash thereby placing the bank loan in jeopardy. Finally, it was undisputed (and the jury was told that to convict it must find) that Attick was the beneficial holder of J. Daren's shares. Under the circumstances, it is clear that the agreement was intended to, and literally did, include the relation that Attick held to J. Daren. The agreement was thus breached as a matter of Rhode Island contract law when Attick took $350,000 from the corporation for his own use; and Attick made a false statement when he caused false Requests for Advances to be submitted stating that it was not.

Attick argues that the words "holder of shares" in the agreement must be interpreted strictly and identically with the Rhode Island Business Corporation Act definition of "shareholder", namely, "one who is a holder *of record* of shares in a corporation". General Laws of Rhode Island § 7-1.102(f). (Emphasis added.) Olympac, not Attick, he adds, was the "holder of record". We reject this argument because we believe that Rhode Island contract law, not corporation law, governs the meaning of the words in the agreement. But, even if

the Corporation Act applies, we note that in "cases involving the relationship between shareholders and corporation ... the corporate entity is disregarded and will be considered as though an association of persons if it is used to defeat public convenience, justify wrong, protect fraud, or defend crime or work an injustice." *Vennerbeck & Clause Co. v. Juergens Jewelry Co.*, 53 R.I. 135, 139, 164 A. 509, 510-11 (1933). *See United Transit Co. v. Nunes*, 99 R.I. 501, 209 A.2d 515 (1965). Thus, we believe that the Rhode Island courts in this instance would, as a matter of law, have pierced Olympac's corporate veil to find Attick the holder of J. Daren's shares.

Defendant also argues that, even if the transfers of cash violated the agreement, the government failed to show that he knew that they did. More particularly, he claims that he *may* have *thought* that under Rhode Island law he was home free because he was not, as a technical matter, a *record* holder of shares. It was up to the government, he adds, to show that he did not think this; he claims that the government must show that he did not — *for this reason* — lack the requisite guilty knowledge.

This argument fails for two reasons. First, there is more than enough evidence in the record for the jury to conclude that Attick knew the transfers breached the agreement. Pacquin's testimony about what Attick said, representations in writing to the bank, the agreement's obvious purpose (preventing the corporation's owners from taking cash out) all warrant a finding that Attick knew that he had promised the bank not to take cash out of the corporation. Second, the government was not required to request individual instructions which specifically negative each and every *conceivable* set of facts that might mean Attick lacked the requisite knowledge. If Attick wished to claim the existence of

an unusual set of facts that, in the circumstances, rebuts an inference of knowledge that would otherwise be drawn, he was obliged to argue such a theory or at least to request an appropriate instruction. *See Mc Murray v. United States*, 298 F.2d 619 (7th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962); *United States v. Hamilton*, 420 F.2d 1096 (7th Cir. 1970). He did not do so here. Rather, he simply rested on the claim that he did not know what was in the agreement — a claim that the jury rejected.

In fact, the district court instructed the jury that to convict it must find beyond a reasonable doubt that Attick "was an owner of stock of J. Daren Corporation" and that it "may find ... the defendant was the beneficial owner" of the J. Daren stock if he was "the sole stockholder of the Olympac Corporation". These instructions, though not totally clear on the issue of contract interpretation, were adequate — particularly because there was no relevant disputed issue of fact. Defendant's objection to these instructions rested entirely upon his theory that, as a matter of law, he could not be convicted because he held J. Daren's shares through Olympac, rather than holding them directly. That theory was erroneous.

The judgment of the district court is therefore *Affirmed.*

Appendix B
Appellant's Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 80-1726

UNITED STATES OF AMERICA,
Appellee,

v.

NICHOLAS A. ATTICK,
Defendant, Appellant.

APPELLANT'S PETITION FOR REHEARING

Now comes the Appellant, Nicholas A. Attick, and pursuant to F.R.A.P. 40, petitions this court for a rehearing of his appeal.

INTRODUCTORY STATEMENT

Pursuant to 1st Cir. R. 15, Appellant represents that the legal issue and factual matter presented in this petition could not have been presented before. The legal issue, the correctness of the trial court's instructions as construed in light of Rhode Island law on contracts, was never argued by the government to either the District Court or this Court, and thus could not have been considered or briefed previously. In fact, the government at trial never presented any Rhode Island cases or statutes to the trial judge when requesting that he alter his instructions in regard to the essential element of Attick's being a shareholder. The argument that Rhode Island contract law, and not corporation law, determines the correctness of the trial judge's instructions was raised *sua sponte* by this Appeals Court during oral argument. Therefore, Appellant has not had a prior opportunity to address this legal argument.

Moreover, the portion of testimony relied upon by this Court has never been addressed, because it only became relevant when this Court held that Rhode Island contract law, and not corporation law, determined the outcome of this appeal.

Framing this introductory statement in the negative, this petition, without waiving the right to so argue in another context, e.g., petition for *certiorari*, assumes *arguendo* this Court's principal twin holdings "that one cannot be convicted under 18 U.S.C. § 1014 if the statement claimed to be false is in fact, literally true"[1] and "that Rhode Island contract law, not corporation law, governs the meaning of the words in the agreement."[2] Appellant then argues for the first time, since the issue could not have been addressed earlier, from the position that Rhode Island contract law governs, and the outcome of this appeal therefore turns on the jury not having been directed that it must decide whether "from the words of the contract and the circumstances surrounding the choice of these words, including representations made in the course of the negotiations"[3] whether or not the defendant believed himself to be a holder of shares in J. Daren. In this setting, the contested instructions on beneficial ownership had the effect of removing an essential element of the offense from the jury's consideration. *United States v. Singleton*, 532 F.2d 199, 206-207 (2nd Cir. 1976). Appellant argues that because the instruction had the effect of deciding a matter which had to be decided by the jury, it satisfies the direct appeal standard (as opposed to *habeas corpus*

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[1] *United States v. Attick*, ___ F.2d ___, ___, (1st Cir., 5/22/81) (No. 80-1726), slip opinion at 3.

[2] United States v. Attick, ___ F.2d ___, ___, (1st Cir., 5/22/81) (No. 80-1726), slip opinion at 5.

[3] *United States v. Attick*, ___ F.2d ___, ___, (1st Cir., 5/22/81) (No. 80-1726), slip opinion at 3 (citations omitted).

standards) set forth in *Henderson v. Kibbe*, 431 U.S. 145 (1977). *See United States v. Moore*, 571 F.2d 76, 88-89 (2nd Cir. 1978). Given that the instructions at trial, were never indicated, by court or prosecutor, as being grounded on a contract theory, there would be no reason for defense counsel to foretell that the instruction would be upheld on such a basis, and, therefore, trial counsel should not be faulted for not objecting to the instruction, and its effect on the jury's consideration of the evidence, from this perspective.

Moreover, since the contested instruction is now upheld as correct as a matter of Rhode Island contract law, and a "literal truth" defense is available, the charge is fatally flawed cause it never directed the jury to consider the parties' understanding leading up to the signing of the contract, and to further consider such an understanding, not merely from the perspective of contract law, i.e., civil burden of proof, but from the context of "literal truth", i.e., that the jury must look "to the meaning intended by the Appellants, rather than to the interpretation of the statements which the .... [bank official] *did in fact make*, or even to the interpretations which the .... [official] *might reasonably have made*." *United States v. Diogo*, 320 F.2d 898, 905-906 (2nd Cir., 1963) (emphasis in original, citations omitted) cited approvingly by this Court in the opinion sought to be reheard.[1]

ARGUMENT

This argument begins with the factual underpinning of the Court's contractual opinion. Slip opinion p. 4.

The decision first points to the prosecutor asking Paquin, the bank's vice president, if Paquin had become

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[1]Slip opinion at p. 3.

aware of Attick's position with Daren; to which Paquin replied that "Attick was president and sole stockholder" of Daren. Tr. 7; slip opinion at 4. While that indicates "the interpretation" a bank official "*did in fact make*", it doesn't even show that it was reasonably made, and clearly doesn't show "the meaning intended by the Appellant [ ]". *Diogo, supra* at 905-6.

The second quote is from Mr. Paquin's cross-examination, and is on point. However, when read in context, it could support a jury's concluding either that Attick believed himself to be a holder of shares who could not receive cash disbursements, or that Attick considered Olympac to be the stockholder, and therefore cash distributions were only barred to Olympac. Tr. 80-82.

The pertinent passage begins with Paquin stating in effect, that Attick told the bank officials that "he was the sole stockholder" Tr. 81, slip opinion at 4. However, defense counsel goes on to ask Paquin whether a document presented to the bank prior to the loan agreements being signed, stated "that the stock in J. Daren Company was owned by a holding company", and Paquin acknowledges that is correct. Tr. 81. Then Paquin is asked whether he was on notice that Attick "did not personally own the stock", Tr. 81. When he hedges, he is then asked whether the bank distinguishes, when they make a loan, between a corporation and an individual and he finally acknowledges that they "are separate and distinct". Tr. 81-82.

Thus, read fully, the testimony just cited could support the jury's reaching one of two conclusions: that Attick indicated to Paquin that he was the holder of shares for purposes of the loan agreement; or, that Attick himself, made a distinction between his holding Olympac shares, and Olympac holding Daren shares.

While, *arguendo*, if the jury had been instructed to decide which meaning Attick intended, a conclusion favoring the government could be upheld, they were never so instructed. *See infra.* The fact, even if true, that the evidence was strong, does not cure an instruction which removes from the jury's consideration an essential element of the offense, and even in the absence of objection, requires reversal. *United States v. Singleton*, 532 F.2d 199, 207 (2nd Cir., 1976). Cf. *Henderson v. Kibbe*, 431 U.S. 145, 153 (1977).[5]

The argument, therefore, turns to the question of the correctness of the entire charge on Attick's intent, the central issue in this case. In *Henderson v. Kibbe*, 431 U.S. 145 (1977), the Supreme Court addressed how to make such a determination. *Henderson* arose out of a *habeas corpus* petition, and thus involved certain stringent considerations not present in the instant case, i.e., did the erroneous instruction so infect " 'the entire trial that the resulting conviction violates due process' ". *Henderson, supra* at 154.

The more general test set forth in *Henderson* is that "an appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given." *Henderson, supra* 431 U.S. at 154.

The first question is what should the instruction have been. This Court has adopted the *Diogo* test in this opinion, p. 3, and it is from *Diogo* that Appellant draws what the instruction should have been, applying that standard to the Rhode Island law relied upon by this Court.

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[5] " ... the evidence was plainly sufficient to prove that fact beyond a reasonable doubt. It is equally clear that the record requires us to conclude *that the jury made such a finding.*" (emphasis supplied).

Appendix B
Appellant's Petition for Rehearing

"The Government has charged in its indictment that the defendant Nicholas Attick, was a shareholder of J. Daren & Sons, Inc., and as such violated a loan agreement entered into on March 23, 1979. Whether the defendant believed himself to be a holder of stock of J. Daren & Sons is an essential element of the offense charged under the circumstances of this case.

"In deciding whether the defendant so believed you need not take his word alone on whether he believed himself to be a shareholder of J. Daren; you may consider 'the words of the contract and the circumstances surrounding the choice of those words, including representations made in the course of the negotiations'.[6] But in considering such evidence, you are not being asked to decide whether the bank believed Nicholas Attick was a holder of Daren shares; you are not asked to decide whether the bank might reasonably have believed Nicholas Attick to be a holder of Daren shares.[7] The question you are to decide is whether Nicholas Attick believed himself to be a holder of J. Daren shares,[8] and you must decide that he did so believe beyond a reasonable doubt, in order to convict."

The instruction that was given began correctly; the first sentence in the proposed charge is identical to the first sentence in the actual charge. Tr. 676. The second sentence in the proposed charge is similar. There are two important differences: (1) where the proposed charge stays with the language of the contract and

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[6]Slip opinion, at 3.

[7]*United States v. Diogo*, 320 F.2d 898, 905-6 (2nd Cir. 1963).

[8]*Id.*

indictment, i.e., holder of shares, the actual charge introduced the concept of ownership of stock; (2) more importantly, the proposed charge focused upon Attick's belief in whether he held Daren stock, and the actual charge focuses upon "[w]hether the defendant is an owner of stock of J. Daren". Tr. 676. Since the jury could determine that the bank not only believed Attick to be a Daren shareholder, but that such an "interpretation ... *might reasonably have* [*been*] *made*," *Diogo, supra* at 906, they were misdirected on how to consider the evidence.

However, all of this pales compared to the next sentence. Instead of commanding the jury to consider what Attick believed as revealed in his statements in the critical period leading up to the signing of the contract, the jury is instead told that if they found that J. Daren stock was owned by Olympac, and defendant was the sole stockholder of Olympac, "you may find that the defendant was the beneficial owner of the stock of J. Daren Company". Tr. 676. This told the jury to ignore any evidence regarding conversations prior to the loan agreement being signed; ignore Attick's repeated statements that he owned Daren through a holding company, and what that statement may have meant to Attick. In fact, the jury is directed to ignore all of the evidence that this Court has relied upon to sustain the correctness of the instruction under Rhode Island law. The objected-to instruction orders the jury to only consider two pieces of evidence, both conceded by the defendant on the stand. Tr. 632. Contrary to *Henderson*, the record in the present case requires a conclusion that the jury never considered whether Attick believed himself to be a J. Daren shareholder; that the jury never considered the record testimony cited to by this Court; and that the instruction objected to here told the jury that since the two matters they

were to review under the reasonable doubt standard were both testified to by the defendant, the jury was, in effect, directed to find Nicholas Attick a holder of J. Daren shares and thus guilty.

That brings up the next issue in this petition: does the absence of the request for "an appropriate instruction," i.e., the instruction suggested earlier in this petition, bar this Court from addressing the issues raised herein. Given the circumstances of this trial and appeal, the answer must be no.

First, since neither the government nor the District Court considered the instruction in light of any Rhode Island law, let alone contract law, the only justification for penalizing trial counsel for not seeking the instruction proposed in this petition would be to hold him accountable for not predicting the basis on which an appellate court would eventually sustain the instructions. Therefore, in the unique circumstances of this case, the plain error rule should not apply.

However, even if it does apply, such a standard is met in this case. The Second Circuit has applied it "where [as here] the charge on a whole had the effect of removing an essential element of the offense from the jury's consideration, *United States. v. Singleton*, 532 F.2d 199, 207 (2nd Cir. 1976)" *United States v. Moore*, 571 F.2d 76, 89 (2nd Cir. 1978).

Finally, this Court held that even if Rhode Island corporation, rather than contract, law applied, the Rhode Island courts would have pierced the "corporate veil to find Attick the holder of J. Daren's shares." Slip opinion at 5.

Again, this only goes half-way: while it authorizes a jury to consider beneficial ownership, it did not instruct the jury to convict only if it concluded that Attick believed himself to be a holder of Daren's shares.

Thus, if the jury were correctly instructed to decide, on all the pertinent evidence, whether Attick believed himself to be such a shareholder, arguably this Court could affirm his conviction. But so long as the jury was so instructed that it (1) never considered his belief and (2) was told that the only evidence regarding who held the shares was the uncontested evidence of the chain of ownership, the issue of Attick's belief was improperly taken away from the jury by the objected-to instruction.

CONCLUSION

Based on the arguments set forth above, Appellant petitions this Court to reconsider its decision entered on May 22, 1981; withdraw that decision; hold that the instruction on Attick's being a Daren shareholder was erroneous in that it took this issue from the jury; and therefore the judgment of conviction must be vacated, and a new trial ordered.

By his attorney,

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Ten Post Office Square
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(617) 582-1187

Appendix C
Appellant's Motion for Permission to File an Amendment to His Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 80-1726

UNITED STATES OF AMERICA,
Appellee,

v.

NICHOLAS A. ATTICK,
Defendant, Appellant.

APPELLANT'S MOTION FOR PERMISSION TO FILE AN AMENDMENT TO HIS PETITION FOR REHEARING

Now comes the Appellant, Nicholas A. Attick and requests this Court grant an order permitting him to file a amendment to his petition for rehearing.

In support of this motion Appellant states:

1. That Roy M. Cohn, Esq., is his counsel in New York and Connecticut and represents him in civil actions relating to the facts relevant to his criminal conviction.
2. That recent trends in the United States Court of Appeals for the Second Circuit have permitted said Court to review a defendants sentence.
3. That the issue regarding the length of his sentence was not addressed by this Court.
4. That Roy M. Cohn, Esq., acting of counsel to Hale, Sanderson, Brynes & Morton, seeks permission to submit, an amendment to Appellant's petition for rehearing outlining the aforesaid trend.

Appendix C
Appellant's Motion for Permission to File an Amendment to His Petition for Rehearing

WHEREFORE, Appellant moves that this Motion be granted.

By his attorney,

Marshall D. Stein
Hale, Sanderson, Brynes & Morton
Ten Post Office Square
Boston, MA 02109
(617) 482-1187

Appendix C
Appellant's Motion for Permission to File an Amendment to His Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

NICHOLAS A. ATTICK,
Defendant, Appellant

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROY M. COHN, being duly sworn, deposes and says:

1. I am New York counsel to Nicholas A. Attick ("Attick"), the Appellant herein and represent him in legal matters in New York and Connecticut. I am admitted to practice law before all of the Courts of the State of New York; United States Court of Appeals for the Second and Fifth Circuits; United States District Courts for the Southern and Eastern Districts of New York; and have been admitted *pro hoc vice* in various Courts throughout the United States, including, but not limited to, the States of Connecticut, Michigan, New Jersey and Texas. For purposes of the within action I am appearing of counsel to Hale, Sanderson, Brynes & Morton, Appellant's counsel in the appeal at bar.

2. I submit the within affidavit in support of a motion permitting Appellant to file an amendment to his petition for rehearing addressing the severity of his sentence. This Court has not previously addressed this issue.

Appendix C
Appellant's Motion for Permission to File an Amendment to His Petition for Rehearing

3. On May 30, 1980, Appellant was convicted on five counts of submitting false statements to a federally insured bank for the purpose of influencing the bank to loan a company money in violation of Title 18, U.S. Code §§ 1014 and 2(b).* He was sentenced to a total of four years imprisonment and fined $25,000.00.

3. Attick is a well-established Connecticut businessman who enjoys an excellent reputation throughout the State of Connecticut where he has always resided. His conviction in this matter of a white collar crime results from a contract interpretation and should not have led to such a severe sentence.

5. Developments in the United States Court of Appeals for the Second Circuit have recently permitted said Court to review a defendants sentence. As a large portion of my practice is in the Second Circuit I am more familiar with this recent trend than Appellant's local counsel.

6. In light of the foregoing I therefore respectfully request the opportunity to address this issue by submitting a review of this matter as an amendment to Appellant's petition for rehearing. Such an amendment can be prepared and filed by Monday, June 15, 1981.

WHEREFORE, it is respectfully requested that this Court issue an order permitting Appellant to file an amendment to his petition for rehearing addressing the severity of his sentence.

/s/ _____
ROY M. COHN

[Notarized]

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*Title 18, U.S.C. § 1014 states in part: "Whoever knowingly makes any false statement or report ... for the purpose of influencing in any way the acts of ... any bank the deposits of which are insured by the Federal Deposit Insurance Corporation ... upon any application, advance ... or loan ... shall be fined not more than $5,000 or imprisoned for not more than 2 years or both."

Appendix C
Appellant's Motion for Permission to File an Amendment to His Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1726

UNITED STATES OF AMERICA,
Appellee,

v.

NICHOLAS A. ATTICK,
Defendant, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

PROOF OF SERVICE

Suffolk, ss. Boston, Massachusetts
June 8, 1981

I, Marshall D. Stein, hereby certify that I have this day served two copies of the Appellant's Motion For Permission To File An Amendment To His Petition For Rehearing by mailing same, postage prepaid, to Assistant United States James O'Neill, Office of the United States Attorney, 221 Federal Building, Providence, Rhode Island 02903, attorney for the appellee.

/s/ _____
Marshall D. Stein

Appendix D
Constitutional Provisions Involved in the Case

UNITED STATES CONSTITUTION, AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

TITLE 18, UNITED STATES CODE, § 1014:

"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured

by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, re-purchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

GENERAL LAWS OF RHODE ISLAND,
§ 7-1.1-2(f):

"7-1.1-2. *Definitions.* -- As used in this chapter, unless the context otherwise requires, the term:

"(f) 'Shareholder' means one who is a holder of record of shares in a corporation."

Appendix E
Notice of Appeal to the Supreme Court of the United States

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 80-1726

UNITED STATES OF AMERICA,
Appellee,

v.

NICHOLAS A. ATTICK,
Defendant, Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Nicholas A. Attick, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order and the order denying a petition for rehearing, affirming the judgment of conviction, entered herein on May 22, 1981 and June 17, 1981, respectively.

This appeal is taken pursuant to 28 U.S.C. 1254(1).

/s/ _____
Marshall D. Stein
Hale, Sanderson, Byrnes & Morton
Ten Post Office Square
Boston, MA 02109
(617) 482-1187

OF COUNSEL

/s/ _____
Roy M. Cohn, Esq.
Saxe, Bacon & Bolan, P.C.
39 East 68th Street
New York, N.Y. 10021
(212) 472-1400

Appendix E
Notice of Appeal to the Supreme Court of the United States

PROOF OF SERVICE

Suffolk, ss. Boston, Massachusetts
June 22, 1981

I, Marshall D. Stein, hereby certify that I have this day served a copy of the NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES by mailing same, postage prepaid, to Assistant United States Attorney James E. O'Neill, Office of the United States Attorney, P.O. Box 1401, Providence, Rhode Island 02901.

/s/ _____
Marshall D. Stein